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COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO THE ELIMINATION OF RACIAL DISCRIMINATION

Working paper prepared by Mr. Marc Bossuyt on the concept of affirmative action

1. In its decision 1997/118 adopted on 28 August 1997, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, taking into account the suggestion of the Committee on the Elimination of Racial Discrimination concerning the preparation of a study on the concept of affirmative action (see E/CN.4/Sub.2/1997/31, annex), decided to entrust the present author with the preparation of a working paper on the concept of affirmative action.

I. International instruments

2. It is worth taking a brief look at the main international rules concerning affirmative action and the prohibition of discrimination.

A. International rules forbidding discrimination

3. Both of the international human rights covenants contain clauses in their article 2 guaranteeing, in the case of the International Covenant on Economic, Social and Cultural Rights (para. 2) "that the rights enunciated ... will be exercised without discrimination of any kind", and in the case of the International Covenant on Civil and Political Rights (para. 1) "the

rights recognized ... without distinction of any kind". It emerges from consideration of the preparatory work that by using the term "distinction", the International Covenant on Civil and Political Rights does not in fact extend the prohibition referred to in the International Covenant on Economic, Social and Cultural Rights, which uses the (more appropriate) term of "discrimination".

4. In article 14 of the European Convention on Human Rights ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground (emphasis added) such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."), discrimination is prohibited solely with respect to the rights and freedoms set forth in the Convention.

5. Article 14 of the European Convention, just like article 2 of both Covenants, forbids discrimination only with respect to the rights "enunciated", "recognized" or "set forth" in the treaties concerned. In other words, the prohibition is limited to the rights guaranteed by the Convention. It is worth noting that, whereas the French version of article 14 of the European Convention appears to prohibit "without distinction", the European Court of Human Rights had occasion to comment in the Belgian use of languages case (Series A, p. 34) that

> "In spite of the very general wording of the French version ('sans distinction aucune'), [... t]his version must be read in the light of the more restrictive text of the English version ('without discrimination')."

6. Article 1, paragraph 1, of the American Convention on Human Rights, reads as follows:

> "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination (emphasis added) for reasons of [...]",

while article 2 of the African Charter on Human and Peoples' Rights states that:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind (emphasis added) such as [...]."

7. Article 26 of the International Covenant on Civil and Political Rights, moreover, contains a general prohibition of discrimination, as follows:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground [...]."

8. In two cases brought by Dutch women, Ms. S.W.M. Broeks (A/42/40, pp. 142-154) and Ms. F.H. Zwaan-de Vries (ibid., pp. 165-174), the Human Rights Committee, on 9 April 1987, found a violation of article 26 of the International Covenant on Civil and Political Rights, as applied to the field of social security.

9. In the Committee's view, the International Covenant on Civil and Political Rights applies even if any of the matters referred to therein is mentioned or incorporated in the provisions of other international instruments.

10. In its judgement of 23 July 1968 in the Belgian use of languages case (Series A, p. 34), the European Court of Human Rights held that "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification (emphasis added). The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized" (emphasis added).

B. Provisions dealing with "affirmative action"

11. Among the most important international provisions dealing with "affirmative action", the following may be mentioned.

12. Article 5 of the Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, adopted on 25 June 1958 by the International Labour Organization, which reads:

> "1. Special measures of protection or assistance provided for in other conventions or recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
>
> "2. Any member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons (emphasis added) who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination."

13. Article 2, paragraph 3, of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted on 20 November 1963, which reads:

> "Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms.

These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups (emphasis added)."

14. Article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, which reads:

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary (emphasis added) in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

15. Article 9, paragraph 2, of the UNESCO Declaration on Race and Racial Prejudice, adopted on 27 November 1978, which reads:

"Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged (emphasis added), so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education."

16. Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, which reads:

"1. Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women (emphasis added) shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

"2. Adoption by States parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

II. The notion of "affirmative action" in jurisprudence

17. There have been situations in the past where specific groups of individuals, who may be identified by reference to the grounds mentioned in the texts prohibiting discrimination, have been subjected to systematic

discrimination. It may be justified or even necessary in such situations to take affirmative measures in order to help such groups overcome the unfavourable situation in which they are placed.

A. Affirmative action in the jurisprudence of the United States Supreme Court

18. There is no way of considering the question of "affirmative action" without referring to the jurisprudence of the United States Supreme Court in the matter of discrimination and more particularly racial discrimination.

19. The first example of such jurisprudence is the judgement passed in 1896 in the famous Plessy v. Ferguson case (163 U.S. 537), in which the United States Supreme Court legitimated the "separate but equal" doctrine. Almost 60 years were to pass before that doctrine was reversed by the judgement delivered in 1954 in the equally famous case of Brown v. Board of Education (374 U.S. 483), in which the Supreme Court held that separate schools inevitably created a feeling of inferiority.

20. Even before that case arose, the Supreme Court had held in its judgement in 1944 in Korematsu v. United States (323 U.S. 214) that any legal restrictions limiting the civil rights of a single racial group were immediately suspect and had to be submitted to very "strict scrutiny". On the other hand, with respect to distinctions on the ground of sex, the Supreme Court subsequently considered only "intermediate scrutiny" to be necessary.

21. In American law, the expression "affirmative action" appears for the first time in Executive Order 10925, signed by President Kennedy in 1961, requiring federal employers to hire more employees belonging to minorities. Two major Civil Rights Acts were signed, one in 1964 by President Johnson and one in 1972 by President Nixon.

22. In 1974, the Supreme Court considered that it did not have to rule on affirmative action measures in the matter of admission to university in the DeFunis v. Odegaard case (416 U.S. 312), on the grounds that the Jewish White student, who had been denied access to the Law School of the University of Washington, had meanwhile been admitted.

23. In the Regents of the University of California v. Bakke case (438 U.S. 265), the Supreme Court was very divided. Judge Lewis F. Powell, who agreed partly with the four judges in favour and partly with the four judges against the affirmative action programme of the School of Medicine of the University of California in Davis, issued a judgement in 1978 in which he held that such a programme had to be subject to very strict scrutiny, but that one of the arguments mentioned in favour of the programme, namely the wish to obtain the benefits derived from an ethnically diversified body of students, was sufficiently compelling for the university to apply it as one of the factors to be taken into consideration in the selection of students.

24. In the years that followed, the Supreme Court issued many judgements, some accepting and some rejecting the affirmative action programmes that came before it. The judgements in favour of affirmative action programmes which had been challenged included the following:

- Steelworkers v. Weber, 443 U.S. 193 (1979),

- Fullilove v. Klutznick, 448 U.S. 149 (1980),

- Sheet Metal Workers v. EEOC (Equal Employment Opportunity Commission), 478 U.S. 421 (1986),

- United States v. Paradise, 480 U.S. 149 (1987),

- Johnson v. Santa Clara County, 480 U.S. 1442 (1987),

- Metro Broadcasting Inc. v. FCC (Federal Communications Commission), 497 U.S. 547 (1990).

25. In the Steelworkers case (1979), the Supreme Court accepted the affirmative action programme reserving training places for Black workers, on the grounds that the programme had been set up by a private employer and was intended to apply to job categories traditionally affected by segregation.

26. In the Sheet Metal Workers (1986), Paradise (1987) and Johnson (1987) cases, affirmative action programmes were accepted because they were intended to remedy cases of intentional discrimination practised in the past to the detriment of Blacks in the metal workers' union of the City of New York and in the Alabama police corps and to the detriment of women belonging to the Skilled Craft category in Santa Clara County (California).

27. In other judgements, the Supreme Court turned down action programmes which were brought before it. The cases concerned were:

Firefighters v. Stotts, 476 U.S. 561 (1984),

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986),

City of Richmond v. Croson, 488 U.S. 469 (1989).

28. In the Firefighters (1984) and Wygant (1986) cases, the affirmative action programmes called respectively for the dismissal of firefighters of the township of Memphis and of teachers in a school in Michigan, all Whites and senior to their Black colleagues. In the Croson (1989) case, the programme reserved 30 per cent of the contracts issued by the township of Richmond (Virginia) to companies belonging to minorities, namely "Blacks, Hispanics, Orientals, Indians, Eskimos and Aleuts". The Court held that such a measure was not "narrowly tailored" to the objective pursued and that it was unconnected with any past discrimination against Eskimos in Virginia.

29. In 1995, the Supreme Court passed judgement in the important case Adarand Constructors v. Pena (115 St. Ct. 2097). The Adarand company was complaining that it had lost a public works contract to a company belonging to a Hispanic on account of a federal law whereby 10 per cent of all public works contracts had to be attributed to minorities.

30. Writing on behalf of a majority of six, Judge Sandra O'Connor held three propositions derived from former Court judgements concerning race-based programmes:

(a) Scepticism: preferences based on racial or ethnic criteria needed to be subjected to the closest scrutiny;

(b) Consistency: the control standard should not depend on the race of those who benefit or suffer from the plan concerned;

(c) Coherence: equal protection should be the same regardless of the level of government (federal or otherwise) involved.

B. Affirmative action in the jurisprudence of the Court of Justice of the European communities

31. As far as the jurisprudence of the Court of Justice of the European Communities is concerned, the Luxembourg Court, passing judgement in the Kalanke v. Freie Hansestadt Bremen case on 17 October 1995, held that:

> "National rules which guarantee women absolute and unconditional priority (emphasis added) for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2 (4) of the Directive."

32. According to article 2, paragraph 4, of European Union Council Directive 76/207/EEC of 9 February 1976, the latter shall be "without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities" in the areas of access to employment, including promotion, and to vocational training.

33. At the same time, the Directive was held to preclude national rules concerning equal treatment for men and women in public services:

> "which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically (emphasis added) give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart".

34. However, in the Marschall v. Land Nordrhein-Westfalen case, the Court of Justice of the European Communities issued a judgement on 11 November 1997, in which it ruled that the above-mentioned Directive did not preclude:

> "A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour (emphasis added) [...] provided that:
>
> - in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override

the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and

- such criteria are not such as to discriminate against the female candidates."

35. The controversial second sentence of paragraph 25 (5) of the Beamtengesetz (Law on Civil Servants of the Land) of 1 May 1981, as last amended on 7 February 1995, provides:

> "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour (emphasis added)."

36. In the Court's view, unlike in the Kalanke case, owing to the "saving clause" ("Öffnungsklausel"), the automatic preference allowed to women may be waived "if reasons specific to an individual male candidate tilt the balance in his favour".

III. Conclusions

37. This note is merely intended to draw attention to a few basic elements, which might serve as a starting point for a study on affirmative action.

38. These basic elements need to be looked at in more detail, and an inventory needs to be drawn up of constitutional and legislative national rules concerning affirmative action, as well as of national jurisprudence arising therefrom.

39. It is suggested that a Special Rapporteur, who might be appointed to deal with this matter, be authorized to request the High Commissioner for Human Rights to send out a brief questionnaire to member States, international organizations and non-governmental organizations, requesting them to send all relevant national documentation on the subject.

40. Among more specific questions to be considered, the following are worth mentioning:

(a) The relationship between the ban on discrimination and affirmative action;

(b) The limitations (in terms of time? or scope? etc.) of affirmative action;

(c) Any differences arising in affirmative action according to various criteria (such as race, sex, language, etc.) which differentiate between groups benefiting from such action.

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